

Hanging on by a Thread: The Exclusionary Rule (Or What's Left of It) Lives for Another Day

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INTRODUCTION

Back when there was a Soviet Union, foreign intelligence officers would anxiously await the May Day parade in Moscow to see who would be standing next to the chairman of the Communist Party and who would be missing from the reviewing platform altogether. Since the Soviet government and the state-controlled press published very little about what was really going on in the halls of state power, this was considered the most reliable way to determine who was in or out of favor and, by extension, how the domestic and foreign policies of the world's second most powerful country were likely to change in the near term.

Readers will, I hope, forgive me when I say that I feel a bit like those erstwhile Kremlinologists whenever I await a decision from the Supreme Court involving the Fourth Amendment exclusionary rule. Ever since the Court's 2006 decision in *Hudson v. Michigan*,¹ which I managed to lose by a 5–4 vote as Booker T. Hudson's attorney, it has been clear that there are four votes on the Court to overrule *Mapp v. Ohio*² and thereby abolish the exclusionary sanction for Fourth Amendment violations. In *Hudson*, the majority held that the exclusionary rule would not apply to knock-and-announce violations at all and, in so holding, broadly suggested that the exclusionary rule itself was unjustifiable and outdated. The only thing apparently standing between *Mapp* and an outright abrogation of the exclusionary rule was Justice Kennedy, who signed the majority opinion in *Hudson* but then issued a cryptic concurrence seemingly repudiating the very same vehemently anti-exclusionary language in the majority opinion that he had joined.³

For three years after *Hudson*, the Court seemed determined to stay away from Fourth Amendment cases altogether. Perhaps this is because neither the majority justices nor the dissenters in *Hudson* knew where Justice Kennedy really stood as to the continuing vitality of the exclusionary rule.⁴

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¹ *Hudson v. Michigan*, 547 U.S. 586 (2006).

² *Mapp v. Ohio*, 367 U.S. 643 (1961).

³ See *id.*; *Hudson*, 547 U.S. at 602–04 (Kennedy, J., concurring) (“[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.”).

⁴ I wrote two articles in the immediate aftermath of *Hudson* in which I tried to make sense of Justice Kennedy's concurrence and what it meant for the future of the exclusionary rule. David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the*

Finally, in 2009, the Court took a case, *Herring v. United States*,⁵ that gave the Court an opportunity to expand on *Hudson*. The nominal issue in *Herring* was whether evidence should be excluded when a police officer reasonably relied on an erroneous arrest warrant in a police database to justify an arrest and resulting search.⁶ In the resulting 5–4 decision concluding that such evidence should not be suppressed, clues emerged as to the internal struggle that must have been going on between Justice Kennedy and the others in the majority. Unlike Justice Scalia’s anti-exclusionary jeremiad in *Hudson*, there is no language in *Herring* directly suggesting that *Mapp* should be overruled. Instead, the majority opinion by Chief Justice Roberts contained a different, more subtle attack on the exclusionary rule, by suggesting that exclusion may be available only to punish “deliberate, reckless, or grossly negligent” violations of the Fourth Amendment.⁷ When the police violate the Fourth Amendment negligently (as opposed to “grossly negligently”), the *Herring* majority suggested, the violation lacks sufficient culpability to justify the heavy sanction of exclusion.⁸

I use the word “suggested” in the preceding paragraph instead of “held” because the distinction the *Herring* majority drew between various culpable mental states that police officers might have while violating the Fourth Amendment is entirely unnecessary to the result. Since, according to the majority, the police acted reasonably in relying on a database of warrants that was well-maintained and relatively error-free,⁹ the case seemed to provide no occasion for the Court to

Fourth Amendment, 2006 CATO SUP. CT. REV. 283 (2006); David A. Moran, *Waiting for the Other Shoe: Hudson and the Precarious State of Mapp*, 93 IOWA L. REV. 1725 (2008).

⁵ *Herring v. United States*, 555 U.S. 135 (2009).

⁶ *Id.* at 138. The Court had earlier held in *Arizona v. Evans*, 514 U.S. 1 (1995), that evidence need not be excluded when police reasonably rely on an arrest warrant found in a database because a court clerk had failed to delete it. *Evans* was thus an extension of *United States v. Leon*, 468 U.S. 897 (1984), in which the Court held that evidence should not be excluded when the police reasonably rely on a search warrant erroneously issued by a magistrate because the exclusionary rule is designed to deter mistakes committed by the police, not by other actors in the system. The salient difference between *Herring* and *Evans*, then, is that it was a police agent who committed the error in *Herring* by failing to accurately maintain the arrest warrant database while it was a court clerk who committed the same error in *Evans*.

⁷ *See Herring*, 555 U.S. at 144 (“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”).

⁸ *See id.* at 147–48 (“In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not ‘pay its way.’” (citation omitted) (quoting *United States v. Leon*, 468 U.S. 897, 907–08 n.6 (1984)).

⁹ As Chief Justice Roberts explained for the majority:

[T]here is no evidence that errors in Dale County’s system are routine or widespread. Officer Anderson testified that he had never had reason to question information about a Dale County warrant, and both Sandy Pope and Sharon Morgan testified that they could

distinguish between officers who are merely negligent and officers acting with more culpable mental states. On the contrary, the majority concluded that the police in *Herring* were not negligent at all.

To put it simply, the language in *Herring* limiting the exclusionary rule to violations committed by grossly negligent (or worse) police officers looks like dicta. The four justices in dissent in *Herring* were careful not to refer to the culpability language in the majority opinion as a holding.¹⁰ But would the majority view it as established law in a future case?¹¹

It was with great interest and anxiety, therefore, that I awaited the Court's decision this summer in *Davis v. United States*,¹² the second case since *Hudson* in which the exclusionary rule may have been in play. In *Davis*, the nominal issue was whether evidence should be excluded when the binding precedent the officers relied upon to perform a search was overruled after the search was performed.¹³

Given the Court's longstanding precedent holding that the sole purpose of the exclusionary rule is to deter the police from committing Fourth Amendment violations, the outcome in *Davis* was entirely predictable: the police won. Still, the case did present some interesting and knotty problems as to how to square the result with the Court's retroactivity jurisprudence.

But more interesting than the result to me were two aspects of the majority opinion that tell us more about where the Court really stands on the exclusionary rule. First, the tone of Justice Alito's majority opinion in *Davis* was almost, but not quite, as critical of *Mapp* and the exclusionary rule as Justice Scalia's opinion in *Hudson*. Second, Justice Alito tried his best to elevate the *Herring* dicta to established precedent even though that dicta has no arguable application at all to the facts in *Davis*.

In this term paper, therefore, I will do two things. First, I will discuss the facts and holding of *Davis* and explain why I concur with the outcome even though I agree with almost nothing else in Justice Alito's majority opinion. Second, I will use the clues sprinkled in that opinion to gauge (or guess?) where the Court really stands on the future of the exclusionary rule.

remember no similar miscommunication ever happening on their watch. That is even less error than in the database at issue in where we also found reliance on the database to be objectively reasonable.

Id. at 147 (citations omitted).

¹⁰ See *id.* at 153 (Ginsburg, J., dissenting) ("The exclusionary rule, the Court suggests, is capable of only marginal deterrence when the misconduct at issue is merely careless, not intentional or reckless.") (emphasis added). As I shall discuss *infra*, Justices Breyer and Ginsburg now explicitly view the culpability language in *Herring* as dicta.

¹¹ Professor LaFave, for one, views the culpability language in *Herring* not as dicta but as a holding that threatens the exclusionary rule itself. See Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757 (2009).

¹² *Davis v. United States*, 131 S. Ct. 2419 (2011).

¹³ See *id.* at 2423 (framing question presented as "whether to apply [the exclusionary rule] when police conduct a search in compliance with binding precedent that is later overruled").

I. DAVIS: THE EASY CASE ON THE SURFACE

A casual reader perusing Justice Alito's majority opinion in *Davis* would likely conclude that this case was a slam dunk for the government. That casual reader would be correct.

To fully understand the legal issues in *Davis* and why the result was entirely predictable, it is necessary to briefly review three lines of the Court's precedent: (1) the Fourth Amendment cases involving searches of automobiles following arrests of occupants of those vehicles; (2) the Court's many pronouncements as to the purpose of the Fourth Amendment exclusionary rule; and (3) the cases in which the Court has explained if and when a judicial decision establishing a new rule of criminal procedure becomes applicable to police activity that occurred before the decision issued.

A. *Belton* to *Gant*: *Arrestees and the Stuff They Leave Behind in Cars*

The first thing that had to happen before the issue in *Davis* could arise was for the Supreme Court to effectively overrule one of its Fourth Amendment decisions in such a way as to cut back on police authority to perform searches and seizures. This sort of event happens very rarely indeed—more about that below—but it did happen in 2009 in *Arizona v. Gant*.¹⁴

In *Gant*, the Court dealt with the question of under what circumstances the police may search the passenger compartment of an automobile after arresting one or more of the occupants of that vehicle. The Court had seemingly answered that question authoritatively twenty-eight years earlier in *New York v. Belton*.¹⁵ In *Belton*, an officer stopped a car on the New York State Thruway and arrested the four occupants. The officer then searched the passenger compartment and found cocaine inside a jacket on the backseat.¹⁶ The Court, after noting that it had already promulgated a bright-line rule permitting automatic searches within the reach (or "grabbing distance") of persons arrested inside dwellings,¹⁷ issued what sure appeared to be a bright-line rule for searches of persons arrested in vehicles: "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."¹⁸

Belton thus issued an easily-understood, bright-line rule: when the police arrest someone who has recently been in a car, the police can search the passenger

¹⁴ *Arizona v. Gant*, 556 U.S. 332; 129 S. Ct. 1710 (2009).

¹⁵ *New York v. Belton*, 453 U.S. 454 (1981).

¹⁶ *Id.* at 456.

¹⁷ See *Chimel v. California*, 395 U.S. 752, 763 (1969) (holding police may search incident to arrest in a dwelling "the area into which an arrestee might reach in order to grab a weapon or evidentiary items").

¹⁸ *Belton*, 453 U.S. at 460.

compartment (but not the trunk) of that car. While the four arrestees in *Belton* were standing, un-handcuffed, on the side of the Thruway while the officer performed the search,¹⁹ nothing in the holding apparently turned on that fact. The majority opinion, it seemed, was based on the sensible proposition that someone in a car who realizes that he or she is about to be arrested is likely to try to hide contraband or weapons.

In the wake of *Belton*, virtually every appellate court in the United States issued decisions confirming that *Belton* had created a simple, bright-line rule: custodial arrest of someone in or recently in a car means that the police can automatically search the passenger compartment.²⁰ I believe it is safe to say that virtually every criminal procedure professor in every American law school taught the same rule to generations of law students. I certainly did.

The first hint that *Belton*'s bright-line rule might not be so bright after all came twenty-three years later in *Thornton v. United States*.²¹ The issue in *Thornton* was, nominally, whether the *Belton* automatic-search rule applied when the arrestee was already out of the car but still next to the car when the officer arrived on the scene.²² The majority concluded that the *Belton* rule did indeed permit an automatic search in such circumstances.²³ However, Justice Scalia, joined by Justice Ginsburg, issued a concurring opinion that surprised many (including me) by attacking the *Belton* bright-line rule. Justice Scalia argued that a search of a vehicle incident to arrest is unreasonable unless the arrestee is unsecured and within reaching distance of the vehicle or the officer has reason to believe that evidence relating to the crime of arrest will be found in the vehicle.²⁴ Justice O'Connor issued a brief concurrence indicating she was inclined to agree with Justice Scalia's criticism of the *Belton* bright-line rule.²⁵ Justices Stevens and Souter dissented from the extension of *Belton* to the situation presented in

¹⁹ *Id.* at 467–68 (Brennan, J., dissenting) (pointing out that under the majority's approach "the result would presumably be the same even if Officer Nicot had handcuffed Belton and his companions in the patrol car before placing them under arrest").

²⁰ See *Davis v. United States*, 131 S. Ct. 2419, 2424 (2011) ("For years, *Belton* was widely understood to have set down a simple, bright-line rule. Numerous courts read the decision to authorize automobile searches incident to arrests of recent occupants, regardless of whether the arrestee in any particular case was within reaching distance of the vehicle at the time of the search.").

²¹ *Thornton v. United States*, 541 U.S. 615 (2004).

²² *Id.* at 617.

²³ *Id.* (holding that "*Belton* governs even when an officer does not make contact until the person arrested has left the vehicle").

²⁴ *Id.* at 632 (Scalia, J., concurring in the judgment). Justice Scalia concurred in the judgment because he concluded that the officer, having arrested Thornton for a drug offense, would have reason to believe that there would be drugs in the car.

²⁵ *Id.* at 624–25 (O'Connor, J., concurring). Justice O'Connor explained that she declined to adopt Justice Scalia's approach because the parties had not briefed it. *Id.* at 625.

Thornton without stating whether or not they agreed with Justice Scalia's approach.²⁶

That meant that there might be as many as five votes to overrule or limit *Belton*. All that was needed was a case to present the issue.

Gant was that case. Taking Justice Scalia's cue from *Thornton*, the Arizona Supreme Court held that the search of *Gant*'s car was unreasonable because he was handcuffed in the back of a patrol car at the time of the search.²⁷

The Court granted certiorari in *Gant* and affirmed by a 5–4 vote.²⁸ In the majority opinion by Justice Stevens, the Court adopted wholesale the framework Justice Scalia had proposed in his *Thornton* concurrence: a search of the passenger compartment of a vehicle incident to arrest is unreasonable if the arrestee is secured and not within reach of the vehicle unless the officer has reason to believe that evidence relating to the crime of arrest will be found inside the vehicle.²⁹

Whether or not one agrees with the majority that the *Belton* bright-line rule permitted too many unreasonable searches, Justice Stevens' majority opinion can only be described as disingenuous in the lengths to which it went to avoid flatly overruling *Belton*. According to Justice Stevens, the fact that *Belton* and his fellow travelers were unsecured and standing on the side of the Thruway made all the difference to the result in that case.³⁰ Never mind that *Belton* had stated a bright-line rule that did not seem to depend on the fact that the arrestees were unsecured or that courts since *Belton* had universally understood that the case created an automatic-search rule. Thus, Justice Stevens concluded, *Belton* need not be overruled; only that "broad reading" of *Belton* need be rejected.³¹ Justice Scalia provided the fifth vote in *Gant* and joined Justice Stevens' opinion to make it a majority, but issued a separate concurrence to make clear that he simply would have overruled *Belton* (and *Thornton* as well).³²

Although *Gant* did not formally overrule *Belton*, it surely marked a sea change in how officers must conduct themselves during traffic stops. No longer could officers automatically search a vehicle upon arresting someone who had recently been inside that vehicle. Since standard police procedure calls for immediately securing arrestees, *Gant* means, in most cases, that the police may perform a search incident to a recent arrest of an occupant if and only if there is reason to believe there is evidence of the crime of arrest there.

²⁶ *Id.* at 633–36 (Stevens, J., dissenting).

²⁷ *State v. Gant*, 162 P.3d 640 (Ariz. 2007).

²⁸ *Arizona v. Gant*, 129 S. Ct. 1710 (2009).

²⁹ *Id.* at 1719.

³⁰ *See id.* at 1717 (pointing out that state's brief in *Belton* emphasized fact that arrestees were close to vehicle at time of search and brief of United States as *amicus curiae* similarly stressed that search occurred before arrest was "completed").

³¹ *Id.* at 1722.

³² *See id.* at 1724–25 (Scalia, J., concurring).

B. The Sole Purpose of the Exclusionary Rule: Deter the Police

The second line of authority in play in *Davis* is the set of cases holding that the sole purpose of the exclusionary rule is to deter the police from committing Fourth Amendment violations. This line arguably goes back at least as far as *Mapp*, which extended the exclusionary rule to state courts because the Court found that other remedies were “worthless and futile” in encouraging the police to comply with Fourth Amendment demands.³³ *Mapp*, however, did not explicitly state that police deterrence was the sole justification for the exclusionary rule.

The primary source of the line leading to *Davis*, however, is the Court’s 1984 decision in *United States v. Leon*³⁴ and its companion case, *Massachusetts v. Sheppard*,³⁵ in which the Court held that the exclusionary rule would not apply if the police reasonably relied upon a warrant issued by a judicial officer even if it turned out that the warrant was unsupported by probable cause (*Leon*) or contained a fatal facial defect (*Sheppard*). After conducting a lengthy review of the history and purposes of the exclusionary rule, the Court in *Leon* concluded that the sole purpose of the rule is to deter police violations of the Fourth Amendment and that, therefore, police officers who reasonably rely upon the validity of warrants issued by magistrates are not engaged in conduct that should be deterred. The Court rejected the notion that magistrates need to be deterred because they are not engaged in the competitive enterprise of ferreting out crime and investigating criminals.³⁶

The Court has extended *Leon* several times. First, in *Illinois v. Krull*,³⁷ the Court held that the exclusionary sanction does not apply to a warrantless search conducted under a statute later held to be unconstitutional, so long as the statute was not so flagrantly unconstitutional that a reasonable officer would not have relied on it. The Court again reiterated that the sole purpose of the exclusionary rule is to deter the police, not legislators who enact unconstitutional laws.³⁸ Second, in *Arizona v. Evans*,³⁹ the Court held that the deterrent purpose of *Leon* would not be furthered by excluding evidence found as the result of an arrest that turned out to be illegal because the clerk of the court had failed to cancel the arrest warrant upon which the officer relied. The *Evans* Court once again repeated the

³³ *Mapp v. Ohio*, 367 U.S. 643, 652 (1961). I say the line arguably goes back “at least as far as *Mapp*” because *Mapp* itself observed that “Only last year the Court itself recognized that the purpose of the exclusionary rule ‘is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.’” *Id.* at 656 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

³⁴ *United States v. Leon*, 468 U.S. 897 (1984).

³⁵ *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).

³⁶ *Leon*, 468 U.S. at 916–17.

³⁷ *Illinois v. Krull*, 480 U.S. 340, 358–59 (1987).

³⁸ *Id.* at 349–52.

³⁹ *Arizona v. Evans*, 514 U.S. 1 (1995).

now-familiar mantra that the sole purpose of the exclusionary rule is to deter the police, not other actors such as sloppy court clerks.⁴⁰

So, the rule from the *Leon* line is fairly clear. Since the exclusionary rule is solely intended to deter the police from violating the Fourth Amendment, evidence will not be excluded if state actors other than the police make mistakes leading to Fourth Amendment violations so long as the police reasonably relied upon the authority they apparently had to act.

C. The Retroactivity of New Rules of Criminal Procedure

Finally, I must say a very quick word about a third line of cases that came into play in *Davis*, namely the precedent declaring when new rules apply retroactively in criminal cases. In the 1960s, the Warren Court issued an impressive series of decisions announcing new rules of criminal procedure governing police interrogations, eyewitness identification procedures, and, of course, search and seizure. Naturally, each of these decisions raised the question as to whether the new rule would require relief to those who had already been arrested and/or convicted under the old rules.

For a while, the Court dealt with this retroactivity problem in an *ad hoc* way. In 1965, the Court announced in *Linkletter v. Walker*⁴¹ that the question of who would obtain relief would be answered by using a case-by-case weighing of the competing interests. Thus, the Court in *Walker* held that the *Mapp* exclusionary rule would be applied to litigants who were still on direct appeal at the time *Mapp* was announced;⁴² but, one year later, the Court held that the rules announced in *Miranda v. Arizona*⁴³ would apply only to defendants whose trial commenced after *Miranda* was decided.⁴⁴ The *Linkletter* approach was arbitrary because it often meant that the lucky litigant (such as *Miranda* himself) who brought a case to the Court would reap the benefits of the new rule, while otherwise identically situated criminal defendants would not. Equally problematic, the case-by-case balancing approach meant that it was difficult, if not impossible, to predict whether a new rule of criminal procedure would apply retroactively and, if so, how far retroactively it would apply: Would the new rule apply to cases on collateral review? To cases still on direct review? To cases not yet tried?

⁴⁰ See *id.* at 14–15 (“First, as we noted in *Leon*, the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees. Second, respondent offers no evidence that court employees are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.” (citations omitted)). Of course, the Court fourteen years later in *Herring* extended *Evans* to the situation where it was the police themselves who failed to properly keep the records. See *Herring v. United States*, 555 U.S. 135 (2009).

⁴¹ *Linkletter v. Walker*, 381 U.S. 618 (1965).

⁴² *Id.* at 639–40.

⁴³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴⁴ *Johnson v. New Jersey*, 384 U.S. 719, 733 (1966).

The Court finally abandoned the *Linkletter* regime twenty-two years later in *Griffith v. Kentucky*,⁴⁵ and instead announced that new rules of criminal procedure are applicable to criminal defendants whose direct appeals were still ongoing at the time the new decision was announced.⁴⁶ Thus, *Griffith* stated a clear decisional rule that state and federal appellate courts must apply: so long as a criminal defendant had properly preserved a claim for appeal, the defendant would be entitled to the benefit of a binding appellate decision in his or her favor on that issue so long as the binding decision came down before his or her conviction was finalized by the end of the direct appellate process.

D. Davis: *An Easy Application of Gant, Leon, and Griffith?*

One day in 2007, Willie Davis had some rotten luck in the small town of Greenville, Alabama. Since Mr. Davis' bad day occurred two years before *Gant* came down, his luck got even worse when he went to court.

Mr. Davis' misfortune began when he accepted a ride from one Stella Owens. Ms. Owens' poor driving resulted in a traffic stop, and a field sobriety test confirmed that she was intoxicated. She was then handcuffed and placed in the back seat of a police car.⁴⁷

The arresting officer then asked Mr. Davis for his name, and Mr. Davis, "after a pause," gave the name, "Ernest Harris."⁴⁸ Unfortunately for Mr. Davis, a group of bystanders had gathered to watch the encounter, and some of them informed the officer that the man was actually Willie Davis. The officer discovered that other data that Mr. Davis had given him (such as date of birth) did indeed match that of Willie Davis, so the officer arrested him for giving a false name to the police. Mr. Davis then was handcuffed and placed in the back of a squad car.⁴⁹

Having custodially arrested not just one but both of the vehicle's occupants, the officer proceeded to search the passenger compartment, where he found a gun in Mr. Davis' jacket.⁵⁰ Mr. Davis was charged in federal court with possession of a firearm by a felon, and the lower courts denied his motion to suppress the gun because the clear holding of *Belton*, as confirmed by binding Eleventh Circuit

⁴⁵ *Griffith v. Kentucky*, 479 U.S. 314 (1987).

⁴⁶ The corollary of *Griffith* is that, with very limited exceptions, a new rule of criminal procedure cannot form the basis for relief for a defendant whose direct appeal ended before the new rule was announced. See *Teague v. Lane*, 489 U.S. 288 (1989).

⁴⁷ This rendition of the facts is drawn from *United States v. Davis*, 598 F.3d 1259 (11th Cir. 2010). For reasons I cannot fathom, Justice Alito's opinion for the Supreme Court leaves out the more entertaining facts.

⁴⁸ *Id.* at 1261.

⁴⁹ *Id.*

⁵⁰ *Id.*

precedent,⁵¹ permitted the officer to search the passenger compartment of Ms. Owens' car incident to the arrests.

After Mr. Davis' conviction, but while his appeal was still pending in the Eleventh Circuit, the Supreme Court decided *Gant*. Despite *Gant*, the Eleventh Circuit affirmed Mr. Davis' conviction. The circuit court agreed that the search of the car that produced Mr. Davis' gun was unconstitutional under *Gant* because both Ms. Owens and Mr. Davis were secured in police vehicles at the time of the search, and the officer did not have reason to believe he would find evidence of their crimes of arrest in the vehicle.⁵² But the court held that the gun could not be excluded because the arresting officer reasonably relied on *Belton* and Eleventh Circuit precedent at the time of the search.⁵³

The Supreme Court granted certiorari and affirmed the Eleventh Circuit's decision by a 7–2 vote. Accepting that the search that produced the gun violated *Gant*, the majority agreed, as do I, that the case presented a very straightforward application of the *Leon* principle that the exclusionary rule does not apply when police officers reasonably rely on legal determinations made by competent authorities. Indeed, it is hard to imagine how an officer's decision to search could be more reasonable than when he relies on a Supreme Court decision and innumerable lower court decisions, including binding lower court decisions, telling him that he is entitled to search in this precise situation. As Justice Alito put it for six members of the Court, "It is one thing for the criminal 'to go free because the constable has blundered.' It is quite another to set the criminal free because the constable has scrupulously adhered to governing law."⁵⁴

Justice Breyer, joined by Justice Ginsburg, dissented primarily on the ground that the result contravened the *Griffith* retroactivity principle—after all, they argued, *Gant* came down during Mr. Davis' direct appeal, so he should be entitled to the full benefit of that decision, including the exclusion of the evidence found in violation of *Gant*.⁵⁵ Justice Alito responded that the *Gant* rule *did* apply to Mr. Davis' case, but whether he was entitled to a particular *remedy* as a result of the

⁵¹ See, e.g., *United States v. Gonzalez*, 71 F.3d 819, 825–26 (11th Cir. 1996) (upholding *Belton* search where arrestee had been removed from car and secured before officer performed search).

⁵² As the Eleventh Circuit explained:

There can be no serious dispute that the search here violated Davis's Fourth Amendment rights as defined in *Gant*. First, both he and the car's driver had been handcuffed and secured in separate police cruisers before Sergeant Miller performed the search. Second, Davis was arrested for "an offense for which police could not expect to find evidence in the passenger compartment," because Miller had already verified Davis's identity when he arrested him for giving a false name.

Davis, 598 F.3d at 1263 (quoting *Arizona v. Gant*, 129 S. Ct. 1710, 1719 (2009)).

⁵³ *Id.* at 1265–68.

⁵⁴ *Davis v. United States*, 131 S. Ct. 2419, 2434 (quoting *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.)).

⁵⁵ *Id.* at 2437–38 (Breyer, J., dissenting).

Gant violation is an entirely separate question from the threshold question of whether he could invoke *Gant* at all.⁵⁶

The trickiest problem for the majority was to answer Mr. Davis' argument that the Court would never have occasion to revisit an erroneous Fourth Amendment decision if criminal defendants could not possibly hope to suppress the evidence the police seized under that decision. Justice Alito came up with a number of answers to this problem, some more satisfying than others. Justice Alito first responded to the dilemma with a metaphorical shrug of the shoulders; the sole purpose of the exclusionary rule is to deter police misconduct, so if defendants lose the incentive to challenge bad Fourth Amendment decisions, well, that's just too bad.⁵⁷

But Justice Alito went on to recognize that an erroneous Fourth Amendment decision from the Supreme Court could be challenged in a civil action against the municipality (thus avoiding the shield that qualified immunity would give to the officers who acted under the challenged precedent).⁵⁸ Or maybe a criminal defendant could obtain review by arguing that his case was distinguishable from the challenged precedent and the Court could then use that case as a vehicle to overrule the precedent.⁵⁹ Or perhaps the Court could just grant suppression to the one lucky criminal defendant who succeeds in convincing the Court to strike down a Fourth Amendment precedent in order to ensure that defendants continue to have the incentive to argue that the Court's precedents should be overruled.⁶⁰

In the end, Justice Alito assured us in perhaps the most telling passage of the majority opinion that the argument Mr. Davis raised is really not much of a problem because the Court almost never overrules its own Fourth Amendment cases to make the law more favorable to defendants: "Indeed, it has been more

⁵⁶ As Justice Alito cogently explained:

Gant therefore applies retroactively to this case. Davis may invoke its newly announced rule of substantive Fourth Amendment law as a basis for seeking relief. The question, then, becomes one of remedy, and on that issue Davis seeks application of the exclusionary rule. But exclusion of evidence does not automatically follow from the fact that a Fourth Amendment violation occurred.

Id. at 2431 (citations omitted).

⁵⁷ *Id.* at 2432–33. Justice Alito went on to note that there would be no disincentive to challenge decisions of lower courts on Fourth Amendment issues and that the Supreme Court would always eventually get an opportunity to weigh in so long as there was a split of authority so that some criminal defendants could claim that the officers were not following binding authority. *Id.* at 2433. This response, of course, does not work when the erroneous decision is a precedent of the Supreme Court.

⁵⁸ *Id.* at 2433 n.9.

⁵⁹ *Id.* at 2433 (Justice Alito cited *Gant* as an example of a case in which a criminal defendant argued that a prior binding precedent, *Belton*, was distinguishable.).

⁶⁰ *Id.* at 2433–34. As Justice Breyer pointed out in dissent, rewarding just the one fortunate litigant who brought the case to the Court is precisely the sort of arbitrariness that led the Court to adopt the *Griffith* rule in the first place. *Id.* at 2437–38.

than 40 years since the Court last handed down a decision of the type to which Davis refers.”⁶¹

Having swatted away all of Mr. Davis’ arguments, the majority concluded that this really is an easy case—the officer relied on binding circuit precedent and the then-universal understanding of *Belton* in concluding that he could search the car after arresting Ms. Owen and Mr. Davis. If the exclusionary rule is really only about deterring the police from violating the Fourth Amendment—and the *Leon* line leaves no doubt that such deterrence is the sole extant justification for the rule—then it would make no sense at all to exclude the evidence here.

And I agree with all of that. In other words, I agree with the result. But while I do not agree with Justices Breyer and Ginsburg that the evidence here should have been excluded, I share their concern about the tone of the majority opinion and what it seems to mean for the future of the exclusionary rule. So I turn to those issues now.

II. WHAT DOES *DAVIS* TELL US ABOUT THE FUTURE OF THE EXCLUSIONARY RULE?

Now that I have worked through what *Davis* was about and what the majority held, it is time to discuss what the case actually means, that is, what signals the decision sends as to the likely outcome of future exclusionary rule cases. I will organize my discussion around four brief observations.

1. A majority of the Court hates the exclusionary rule. This, of course, is the most obvious observation. Justice Alito’s majority contained the now-obligatory “we can’t stand the exclusionary rule” section. This section rehashed all of the greatest hits from earlier decisions cutting back on the exclusionary rule, including: (1) the “substantial social costs” claim;⁶² (2) the “we used to blindly apply the exclusionary rule, but no more” discussion;⁶³ and (3) the rule must “pay its way” proclamation.⁶⁴

It seems that every exclusionary rule decision since *Leon* has contained some discussion of how much the Court dislikes the rule, but *Hudson* took the disdain to a whole new level. *Davis* serves to simply

⁶¹ *Id.* at 2433 (citing *Chimel v. California*, 395 U.S. 752 (1969), as the last case to overrule precedents of the Court as insufficiently protective of Fourth Amendment rights).

⁶² *Id.* at 2427 (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)). The “substantial social costs” discussion invariably makes the obvious point that the rule results in exclusion of probative evidence and usually means that a criminal will go free. There is never any discussion of how often this actually happens. Justice Alito’s majority opinion in *Davis* is perhaps notable for adding “bitter pill” to the list of phrases used to denigrate the exclusionary rule. *Id.*

⁶³ *See id.* (“Admittedly, there was a time when our exclusionary-rule cases were not nearly so discriminating in their approach to the doctrine.”).

⁶⁴ *Id.* at 2428 (quoting *Leon*, 468 U.S. at 908, 919).

remind us that nothing has changed since *Hudson*: the Court still finds the exclusionary rule deeply distasteful.

2. The exclusionary rule survives in principle, if not in practice, because Justice Kennedy's concurrence in *Hudson* actually meant something. The most important fact about *Davis* is that we still have a Fourth Amendment exclusionary rule five years after *Hudson*. Given the evident hostility to *Mapp* that permeated Justice Scalia's majority opinion in *Hudson*, this can only mean one thing: Justice Kennedy is still not on board for overruling *Mapp* and abrogating the exclusionary rule.

For the first few years after *Hudson*, speculation was rife as to whether the Court would soon overrule *Mapp*.⁶⁵ The decision in *Hudson* certainly provided lots of reasons to think that such a direct attack on the exclusionary rule was coming. Five members of the Court signed an opinion that denigrated *Mapp* as an outdated decision based on assumptions that no longer held water.⁶⁶ But Justice Kennedy both signed that opinion and issued a concurrence that assured us that, despite the anti-*Mapp* language he had joined in the majority opinion, the continued existence of the exclusionary rule was not in doubt.⁶⁷

Five years and two major decisions after *Hudson*, it now clear that Justice Kennedy meant what he said in his *Hudson* concurrence and that he will not vote to overrule *Mapp*. So the opinion in *Davis* says lots of nasty things about the exclusionary rule but, unlike *Hudson*, does not repeat any of the language from *Hudson* arguing that *Mapp* is outdated and misguided. The exclusionary rule, or what remains of it, is safe for a while longer.

3. *Herring* and *Davis* illustrate the Court's strategy to destroy the exclusionary rule without actually overruling *Mapp*. Since Justice Kennedy is apparently not going to vote to overrule *Mapp*, the anti-exclusionary justices have decided to defang the rule instead by sharply

⁶⁵ See, e.g., Ricardo J. Bascuas, *Fourth Amendment Lessons From the Highway and the Subway: a Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 788 (2007) (recognizing that the majority opinion in *Hudson* clearly "implies that the exclusionary rule's days are numbered"); Erwin Chemerinsky, *An Overview of the October 2005 Supreme Court Term*, 22 TOURO L. REV. 873, 879 (2007) (concluding that after *Hudson*, "the continued existence of the exclusionary rule [and] the exceptions that will be created, all depend on Justice Kennedy"); Thomas Y. Davies, *An Account of Mapp v. Ohio that Misses the Larger Exclusionary Rule Story*, 4 OHIO ST. J. CRIM. L. 619 (2007) (concluding that exclusionary rule was in doubt after *Hudson*); Frederick Schauer, *Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 28 n.76 (2006) (arguing that *Hudson* "signals growing doubts about the future viability of the exclusionary rule itself").

⁶⁶ See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 597 (2006) ("We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago.").

⁶⁷ *Id.* at 602–03 (Kennedy, J., concurring).

limiting its reach. The best evidence that this is a concerted strategy is that the Court has now twice announced a “culpability” limitation on the application of the exclusionary rule even though the officers’ culpability was not at issue in either case.

As I discussed in the introductory portion of this term paper, Chief Justice Roberts used his *Herring* majority opinion in an attempt to engraft a brand new, officer-culpability requirement onto the exclusionary rule. Only deliberate, reckless, or grossly negligent conduct by individual officers would require exclusion; mere ordinary negligence would not.⁶⁸ Never mind that this discussion was dicta since the line between ordinary negligence and gross negligence was not at issue in *Herring*, and never mind that the opinion made no serious effort to explain the difference in the context of a typical Fourth Amendment violation.

Justice Alito went far out of his way in his opinion in *Davis* to reinforce the *Herring* dicta. There was no conceivable argument in *Davis* that the police engaged in any negligent conduct of any kind. On the contrary, as Justice Alito correctly recognized, the arresting officer followed the widespread understanding of *Belton* and the binding circuit precedent to the letter when he searched the car after custodially arresting Stella Owens and Willie Davis. Therefore, there was absolutely no occasion in *Davis* to discuss or apply the *Herring* dicta distinguishing between mere negligence and more culpable forms of police misconduct.

But the lack of a reason to discuss the *Herring* culpability framework did not stop Justice Alito from doing so anyway. In the key paragraph of his opinion, he reframed the *Herring* dicta as if it had actually flowed directly from the *Leon* line:

The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion “var[y] with the culpability of the law enforcement conduct” at issue. *Herring*, 555 U.S. at 143. When the police exhibit “deliberate,” “reckless,” or “grossly negligent” disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. *Id.* at 144. But when the police act with an objectively “reasonable good-faith belief” that their conduct is lawful, *Leon, supra*, at 909 (internal quotation marks omitted), or when their conduct involves only simple, “isolated” negligence, *Herring, supra*, at 137, the “deterrence rationale loses much of its force,” and exclusion cannot “pay its way.”

⁶⁸ *Herring v. United States*, 555 U.S. 135, 144 (2009).

See *Leon*, *supra*, at 919, 908, n. 6 (quoting *United States v. Peltier*, 422 U.S. 531, 539 (1975)).⁶⁹

Justice Alito thus treated the *Herring* “isolated negligence vs. gross negligence” dicta as if it were a well-established part of the *Leon* line. He then “applied” that “rule” in the case at hand by noting that “[t]he officers who conducted the search did not violate Davis’ Fourth Amendment rights deliberately, recklessly, or with gross negligence.”⁷⁰ But, as pointed out above, the officer also did not violate Davis’ right with “isolated” or “ordinary” negligence, either. In other words, the application of the *Herring* dicta in *Davis* is itself pure dicta.

It was left to Justice Breyer in his dissent to point out that the *Herring* dicta is, in fact, dicta and that this dicta threatens to eviscerate the exclusionary rule. As Justice Breyer put it, if the exclusionary rule would apply only where a “violation was ‘deliberate, reckless, or grossly negligent,’ then the ‘good faith’ exception will swallow the exclusionary rule. Indeed, our broad dicta in *Herring*—dicta the Court repeats and expands upon today—may already be leading lower courts in this direction.”⁷¹

Since neither *Herring* nor *Davis* actually required the Court to draw the line between isolated or ordinary negligence and gross negligence, the Court has not answered the most obvious question about what the dicta means: if an officer violates the Fourth Amendment based on an honest misunderstanding as to what the law permits, is that gross negligence or ordinary negligence? If an officer’s honest misunderstanding of the law is mere ordinary negligence, it follows immediately, as Justice Breyer recognized, that the *Herring* dicta means that the vast majority of Fourth Amendment violations will not result in exclusion.⁷² As Justice Breyer quoted Professor LaFare, “Surely many more Fourth Amendment violations result from carelessness than from intentional constitutional violations.”⁷³

So the question remains: what, exactly, does the Court mean by “gross negligence,” as opposed to isolated or ordinary negligence? To take one concrete example, suppose that an officer who was a member of a team lawfully in a home to perform an arrest found a gun while performing a protective sweep of the home shortly after the arrestee had

⁶⁹ *Davis*, 131 S. Ct. at 2427–28.

⁷⁰ *Id.* at 2428 (citing *Herring*, 555 U.S. at 144).

⁷¹ *Id.* at 2439 (Breyer, J., dissenting).

⁷² See *id.* at 2439 (recognizing that “an officer who conducts a search that he believes complies with the Constitution but which, it ultimately turns out, falls just outside the Fourth Amendment’s bounds is no more culpable than officer who follows erroneous “binding precedent.”).

⁷³ *Id.* (quoting 1 WAYNE R. LAFARE, SEARCH AND SEIZURE § 1.3, 64 (4th ed. 2004)).

been taken out of the home. That search was unlawful because a protective sweep may only be conducted while the arrestee is still on the premises.⁷⁴ But suppose the officer honestly believed he could perform a protective sweep after the arrest was completed so long as the sweep was substantially contemporaneous to the arrest. I would be hard-pressed to call the officer “grossly negligent” for misunderstanding the law given that my highly-educated criminal procedure students often make the same mistake when faced with such a problem on an exam.

One more example has to be mentioned, this one arising from the *Gant/Belton* line itself. Suppose an officer who graduated from police academy in 2008, where she was taught and trained in *Belton* searches, performed a vehicle search incident to arrest in 2010 after arresting the driver for drunk driving and securing him in the back of her squad car. Was the officer “grossly negligent” in 2010 for not realizing that *Gant* in 2009 had rejected the broad reading of *Belton* under which she had been trained?

Since the discussion of officer culpability in *Herring* and *Davis* was dicta, we do not really know what “gross negligence” means. But if the term is to have the meaning usually ascribed to it, a deviation from the standard of care so great that society is justified in imposing criminal sanctions for the breach, it would be hard to imagine how an officer could be called “grossly negligent” for an honest misunderstanding as to what kinds of searches and seizures the Fourth Amendment permits.

If the Court means, as Justice Breyer and I suspect it means, a run-of-the-mine mistake by an officer who has failed to grasp the fine points of Fourth Amendment doctrine is not “grossly negligent,” the exclusionary rule game is really over. In that case, it just does not matter whether *Mapp* is formally overruled or not. Such a holding would eliminate any incentive for police forces to intensively train their officers on the fine points of search and seizure law, and it would reward officers who err on the side of searching and seizing. Such a holding would, in one stroke, remove most of the remaining protections the Fourth Amendment provides against overzealous police conduct.

Unfortunately, I think that is exactly what the Court means to do. Having failed to persuade Justice Kennedy to go along with a complete overruling of *Mapp*, the other members of the *Hudson* majority have adopted a strategy of stating a rule of minimizing the exclusionary rule by excluding the vast majority of violations from its reach. The Court stated that rule in *Herring* and strongly restated it in *Davis*.

⁷⁴ See *Maryland v. Buie*, 494 U.S. 325, 335–36 (1990) (“The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.”).

Dicta twice stated starts to look a lot like a holding. And when the next case comes around in which the officer got the law wrong but was not “grossly negligent” in her misunderstanding, the majority will be in position to say that this is exactly the sort of case that the *Herring* “rule” was intended to remove from the operation of the exclusionary rule. And then the exclusionary rule will just be a vestigial doctrine that can be trotted out on those very rare occasions when an officer behaves so brazenly that his or her conduct can only be characterized as “grossly negligent” or worse.

4. The newest justices are not much help. As a final observation, it is worth mentioning that the two justices who were not on the Court when *Hudson* and *Herring* were decided do not affect the above analysis. First, of course, there is simple math. *Hudson* and *Herring* were decided by five votes to four, and all five members of the majority in those cases are still on the Court. Since Justice Kennedy is apparently willing to go along with an evisceration of the exclusionary rule so long as *Mapp* is not actually overruled, the fact that two members of the *Hudson* and *Herring* dissents have been replaced does not really matter.

Justice Sotomayor wrote a brief opinion concurring in the judgment in *Davis*. She agreed with the majority, as do I, that exclusion is inappropriate when an officer followed binding precedent subsequently overruled.⁷⁵ But she wrote separately to stress that exclusion is appropriate when an officer acts in the face of unsettled Fourth Amendment law because otherwise officers “would have little incentive to err on the side of constitutional behavior.”⁷⁶ Justice Sotomayor then clearly signaled that she will not go along with a decision based on the *Herring* culpability dicta: “We have never refused to apply the exclusionary rule where its application would appreciably deter Fourth Amendment violations on the mere ground that the officer’s conduct could be characterized as nonculpable.”⁷⁷

Justice Kagan, on the other hand, joined Justice Alito’s majority opinion. Perhaps Justice Kagan, who does not have a background in criminal law, has not thought through what the *Herring* dicta would mean to the exclusionary rule and will part company with the *Hudson* and *Herring* majority when a case testing whether “gross negligence” is truly required for exclusion comes to the Court. Or perhaps Justice Kagan is no fan of the exclusionary rule. I have no idea which theory is correct, but I certainly wish she had not joined the majority decision.

⁷⁵ *Davis*, 131 S. Ct. at 2435 (Sotomayor, J., concurring in judgment).

⁷⁶ *Id.* (quoting *United States v. Johnson*, 457 U.S. 537, 561 (1982)).

⁷⁷ *Id.*

CONCLUSION

To use a trite metaphor, the exclusionary rule is on life support. *Davis* confirms that the Court will not overrule *Mapp* anytime soon, but it also confirms that a solid majority of the justices have devised a strategy that eliminates any need to formally abolish the exclusionary rule.

It seems inevitable that the Court will soon take a case squarely presenting the issue that the *Herring* dicta has created: if an officer performs an unconstitutional search and seizure based on a simple misunderstanding of what the law permits, should the resulting evidence be excluded? I fear that five members of the Court are prepared to answer that question “yes.”